Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO. 85-1834

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

MEYER BILLER,

Petitioner

v.

STATE OF CONNECTICUT,

Respondent.

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

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May , 1986

EDITOR'S NOTE

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SUPREME COURT

STATE OF CONNECTICUT

No. PSC-85-1083

STATE OF CONNECTICUT

V.

MEYER BILLER

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the defendant for certification to appeal from the Appellate Court (5 Conn. App. 616) it is hereby ordered that said petition be, and the same hereby is denied.

BY THE COURT,

/s/
Assistant Clerk-
Appellate

DATED: March 6, 1986

000302

602, 608, 478 A.2d 994 (1984); *State* v. *Festo*, 181 Conn. 254, 259, 435 A.2d 38 (1980); *In re Juvenile Appeal (85-2)*, 3 Conn. App. 184, 193, 485 A.2d 1362 (1985). The general rule is that witnesses must state facts and not their individual opinions and conclusions. *State* v. *Palozie*, 165 Conn. 288, 297, 334 A.2d 468 (1973); *Sydleman* v. *Beckwith*, 43 Conn. 9, 11 (1875); *Moody* v. *Pinto*, 37 Conn. Sup. 786, 788, 436 A.2d 1099 (1981).

The facts construed most favorably toward sustaining the verdict indicate that the manager had no ear problems prior to the altercation with the defendant. Her symptoms developed immediately after the attack and persisted for the four months prior to trial. During the trial, she continued to undergo treatment for blockage to her inner ear, which she attributed to having been punched in the face by the defendant. The jury could reasonably infer that this problem was caused by the defendant's assault and that the victim suffered a "serious impairment of health or serious loss or impairment of the function of any bodily organ." General Statutes § 53a-3 (4).

The defendant's claim that she had been deprived of effective assistance of counsel is without merit.

There is no error.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MEYER BILLER
(2073)

SPALLONE, DALY and BIELUCH, Js.

The defendant, who had been seen by a police arson inspector exchanging documents with the owner of certain New Haven premises in which a fire had occurred and who was placed under arrest for acting as a public adjuster without a license, was charged, further, with the crime of interfering with an officer after he resisted the efforts of the police to search his pockets. On the defendant's appeal from his conviction of interfering with an officer, *held*:

CC0003

1. The defendant's claims that the trial court should have dismissed the information against him because of the illegality of his initial arrest, that that court erred in refusing to admit evidence of that illegality at the hearing on his motion to dismiss and that the police were not in the performance of their duties at the time of his alleged interference were without merit since the legality of a police officer's conduct is not an element of the crime of interfering with an officer.
2. The defendant's claim that his actions did not amount to a material interference with the performance of the duties of the arresting officers was unavailing; there was sufficient evidence presented to allow the jury to decide whether he had interfered with the officers.
3. The defendant's claims that the court erred in its instructions to the jury were without merit.
4. The defendant's claim to the contrary notwithstanding, the state's closing argument did not contain facts which were not in evidence.
5. The trial court did not err either in ruling that evidence of the defendant's prior conviction of the crime of falsely certifying as to the administration of an oath could be admitted to impeach his credibility if he were to testify, or in taking that evidence into consideration at the time of sentencing; although his conviction was the subject of a pending appeal, a trial court may, in its discretion, admit evidence of a prior conviction despite the pendency of an appeal.
6. The trial court did not err in refusing to strike the testimony of one of the state's witnesses; although a recorded statement given by that witness to the police could not be produced by the state, the prejudice to the defendant did not, under the circumstances here, warrant a reversal of his conviction.

Argued October 11—decision released December 17, 1985

Information charging the defendant with the crimes of acting as a public adjuster without a license, in count one, and interfering with an officer, in count two, brought to the Superior Court in the judicial district of New Haven, geographical area number six, and tried to the jury before *W. Sullivan, J.*; after the court declared a mistrial as to count one, verdict and judgment of guilty on count two, from which the defendant appealed to this court. *No error.*

M. Mitchell Morse, for the appellant (defendant).

Christopher Malany, special deputy assistant state's attorney, with whom, on the brief, were *John Waddock* and *Carl Schuman*, assistant state's attorneys, for the appellee (state).

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BIELUCH, J. This appeal arises out of the defendant's conviction, after a jury trial, on a charge of interfering with an officer in violation of General Statutes § 53a-167a. The defendant has raised eight claims of error with regard to his conviction. We find no error.

The jury could reasonably have found the following facts. On March 12, 1981, a fire took place at a house owned by Wilken Shaw located at 79 Hallock Street in New Haven. At the scene of the fire, Joseph Toscano, an arson control assistant inspector assigned to the office of the New Haven State's Attorney, saw the defendant approach Shaw and his daughter-in-law, Willa Shaw. Toscano watched as the defendant spoke to the Shaws and provided them with some documents which Wilken Shaw signed. Toscano then approached the defendant and the Shaws with another officer, Joseph Howard. As the officers approached the trio, they heard the defendant state to the Shaws that he would contact the insurance companies.

Toscano identified himself to the defendant who responded by acknowledging that he knew Toscano's identity. Toscano then asked the defendant if he was licensed to act as a public adjuster in this state. Toscano also, at that time, saw the documents which Shaw had signed. He believed that one of those documents was a retainer for the services of a public adjuster. Because he knew that the defendant no longer was licensed as a public adjuster, Toscano ordered the defendant's arrest for violating General Statutes § 38-71, which prohibits acting as a public adjuster without a license.

At some time during these events,[1] the defendant tore up certain documents which Shaw had signed and placed the pieces in his pocket. After the arrest,

[1] Because the specific timing of this event is important and is not sufficiently established, we cannot clarify this sequence of events any further. In view of our holding, such further clarification is unnecessary.

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Howard handcuffed the defendant. When the officers attempted to search his pockets, however, the defendant resisted this effort and struggled to prevent them from doing so. The officers then led the defendant to a police car. There, the police succeeded in entering the defendant's pockets and retrieving the remnants of the torn documents.

The defendant was charged with violation of General Statutes § 38-71, acting as a public adjuster without a license, and of General Statutes § 53a-182, disorderly conduct. By substitute information, the second count was changed to interfering with a police officer in violation of General Statutes § 53a-167a.[2] The defendant pleaded not guilty to both counts of the substituted information and, after a trial, the jury was unable to agree on a verdict on the first count and a mistrial was declared as to that count. The jury, however, found the defendant guilty on the second count.

I

The defendant's first three claims of error are: (1) that the court erred in denying his motion to dismiss the substituted information against him based upon his claim that his original arrest had been illegal; (2) that the court improperly restricted the evidentiary hearing on the motion to dismiss so as to prevent the defendant from presenting evidence which would have demonstrated that the police originally lacked probable cause to arrest him; and (3) that because they were acting illegally, the police were not in the performance of their duties as required by General Statutes § 53a-167a. We find these claims to be without merit.

At the outset, we note that the defendant does not appeal from the mistrial declared on the first count of

[2] General Statutes § 53a-167a (a) provides: "A person is guilty of interfering with an officer when he obstructs, resists, hinders or endangers any peace officer or fireman in the performance of his duties."

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the information lodged against him. Only the charge upon which he was convicted and sentenced is at issue here. Since we conclude that the illegality of the defendant's initial arrest is not, per se, a defense to the charge of interfering with an officer, these claims of error must fail.

In *State* v. *Privitera*, 1 Conn. App. 709, 476 A.2d 605 (1984), this court held that "the legality of the police officer's conduct is not an element of the crime defined by General Statutes § 53a-167a (a), and that, in a prosecution under that statute, to the extent that the state's case is based on the conduct of a police officer in making an arrest, by virtue of General Statutes § 53a-23 the illegality of that arrest is not a defense [to that charge]." Id., 719. But even more so here, the defendant's conviction pursuant to the same statute as in *Privitera* bears no fundamental relationship to the legality of his initial arrest. Rather, it is his conduct after arrest which supported this charge and is at issue.

Our holding by no means renders any and all police misconduct irrelevant. A violation of General Statutes § 53a-167a only occurs when interference with the officer is "in the performance of his duties." "If [the officer] is acting under a good faith belief that he is carrying out that duty, and if his actions are reasonably designed to that end, he is acting in the performance of his duties." *State* v. *Privitera*, supra, 722. Thus, the question is not whether there was probable cause for the defendant's original arrest, or whether that arrest was otherwise illegal. The test is whether the officer is acting in good faith within the scope of his duties as an officer or is pursuing a personal intent or frolic of his own. Id. Thus, in the present case, the lack of probable cause to arrest the defendant on the original charges was irrelevant to the court's jurisdiction over his prosecution for violation of § 53a-167a, and his motion to dismiss this charge was properly denied.

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Similarly, the court's failure, at the hearing on the motion to dismiss the information, to admit further evidence on the issue of the officers' probable cause to arrest the defendant cannot be found to be improper, since such evidence was irrelevant to the court's jurisdiction over the charge now on appeal.

II

The defendant next claims that his actions in preventing the police from searching his pockets immediately after his arrest did not amount to a material interference with the performance of the duties of those officers. We disagree.

The defendant's argument is, essentially, that by his actions, he merely delayed the officers' search of his pockets until he was away from the public spotlight at the scene of the fire. That, he argues, does not constitute interference with the performance of the officers' duties, but merely with the timing thereof. We see no meaningful distinction in this case. The defendant's argument seems to be that unless he successfully prevented the police from obtaining the torn documents from his pockets, he merely attempted to interfere with the police, at best. General Statutes § 53a-167a, however, defines "interfering" to include obstruction, resistance, hindrance or endangerment. To "obstruct" is defined as "to be or come in the way of: hinder from passing, action, or operation." To "resist" is defined as "to withstand the force or the effect of: be able to repel or ward off." To "hinder" is defined as "to make slow or difficult the course or progress of." "Endangerment" is defined as "the act of placing in danger or the state of being placed in danger." Webster, Third New International Dictionary. At the very least, the delay caused to the officers in this case was sufficient to raise a jury question regarding whether there had been an interference in violation of General Statutes § 53a-167a.

III

The defendant next claims that the court erred in its charge to the jury. He claims that the court erred in four respects in charging the jury on the elements of General Statutes § 53a-167a and in referring to General Statutes § 53a-23, which abrogates the common law right to resist an illegal arrest. We have carefully reviewed the defendant's exceptions to the charge and we conclude that they are without merit. "In considering a charge, critical dissection is not required. The charge as a whole must be considered from the standpoint of its effect on the jury in guiding them to a proper verdict." *State* v. *Taxiltaridis*, 2 Conn. App. 617, 620, 481 A.2d 98 (1984). The test must be whether "the court's instructions, taken as a whole, fairly and adequately presented the case in such a way that injustice was not done to either party under the established rules of law." Id. We conclude that the defendant's claims are based on a narrow reading of brief excerpts from the charge which are taken out of context and do not do justice to the parties. In this manner, the defendant incorrectly characterizes as error the court's proper and complete guidance of the jury to its verdict.

IV

The defendant next claims that the court erred in permitting the prosecutor to argue, in his closing remarks to the jury, facts which were not in evidence. This claim is made despite the defendant's failure to object to those remarks at trial[3] and despite his own prior statement

[3] Counsel asserts that any such objection would have been futile and that he was, therefore, not obligated to object. *Grant* v. *Pagter*, 133 Conn. 646, 649, 53 A.2d 380 (1947); *Tracy* v. *O'Neill*, 103 Conn. 693, 699, 131 A. 417 (1925). He further asserts that because this error rises to the level of a violation of constitutional rights, the failure to object should be excused pursuant to *State* v. *Evans*, 165 Conn. 61, 71, 327 A.2d 576 (1973). Because we find no colorable claim, as alleged, of violation of a fundamental constitutional right, we need not consider *Evans* further.

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to the jury which was to the same effect as that to which he now objects. The factual argument which the defendant raises by this issue was the prosecutor's comment that the defendant "tore up the documents *when the police officers wanted them.*" (Emphasis added.) This statement was made by the prosecutor in paraphrase of a written statement in evidence which Wilken Shaw had given to a private investigator for the defendant. That written statement was that "the men wanted the form he had, but, he tore it up rather than give it to them." We conclude that the prosecutor's comment was an accurate and unobjectionable paraphrasing of the original written statement given by Wilken Shaw to the defendant's investigator. His rephrasing of the evidence was proper summation or argument to the jury.

V

The defendant's penultimate claim is that the trial court erred in ruling, in response to the defendant's motion in limine, that his prior conviction on two counts of falsely certifying as to the administration of an oath, a violation of General Statutes § 53-368, could be admitted into evidence for the purpose of impeaching the defendant's testimony if he chose to testify. This claim is based on the fact that these convictions were the subject of an appeal at the time when the trial court ruled on the defendant's motion.[4] We conclude that the trial court did not err here.

The trial court, in its discretion, may admit evidence of a prior conviction for impeachment purposes despite the pendency of an appeal. *State* v. *Schroff*, 3 Conn. App. 684, 689, 492 A.2d 190 (1985). The court must, however, also permit defense counsel to point out the

[4] We note at the outset that this motion was repeated at the close of the defendant's case and was then denied a second time. The record indicates that it was only at the time of this second motion that the appeal was disclosed to the court.

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pending appeal to the jury. Id. Thus, in the present case, it was not error to deny the defendant's motion in limine.

The defendant has also argued that the use of the convictions then on appeal as a factor in his sentencing was improper. In addition to our conclusion above, that the use of those convictions for impeachment was proper, we hold that their use in sentencing was also proper. The trial court has broad discretion in sentencing and in the absence of an abuse of that discretion, we will not reverse the sentence imposed. *State* v. *Rose*, 168 Conn. 623, 638, 362 A.2d 813 (1975). In the present case, the trial court only acknowledged that the "[t]wo felony convictions in the past even though they are on appeal, must be considered." We cannot conclude that the trial court's use of those convictions in sentencing was an abuse of discretion.

VI

Finally, the defendant claims that the court erred in denying his motion to strike the testimony of Wilken Shaw after the state failed to produce a recorded statement given by Shaw to the police. The state produced a transcript of the recorded statement, asserting that the recording itself had been erased in accord with New Haven police department policy. The defense, however, claimed that this was insufficient compliance with Practice Book §§ 748 through 755. Thus, the defense moved, pursuant to § 755, that the testimony of Shaw be stricken or that, in the alternative, a mistrial be declared. The court denied that motion. In this we also find no error.

Whether sanctions should be imposed for nondisclosure in a given case, such as the present one, requires the weighing of the state's culpability in failing to produce the statement against the amount of prejudice incurred by the defendant due to the loss of

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the statement. *State* v. *Myers*, 193 Conn. 457, 467, 479 A.2d 199 (1984); *State* v. *Shaw*, 185 Conn. 372, 386, 441 A.2d 561 (1981), cert. denied, 454 U.S. 1155, 102 S. Ct. 1027, 71 L. Ed. 2d 312 (1982); *State* v. *Zayas*, 3 Conn. App. 289, 295–96, 489 A.2d 380 (1985). We must agree with the court in *State* v. *Myers*, supra, which concluded that the erasure of the recording by the police, in circumstances similar to those in the present case, was unexcused. Id., 469. We also note, however, that the court in *Myers* found that the prejudice to the defendant arising from the erasure did not warrant a reversal of the conviction, and we reach the same conclusion here.

A transcript of Shaw's recorded testimony, signed by him, was offered to the defense in lieu of the recording itself. The defense claimed that this transcript was insufficient and moved for permission to conduct a voir dire examination of Howard who had already testified and who had recorded the statement from Shaw. The trial court denied that motion but encouraged the defendant to cross-examine Shaw regarding whether the transcript accurately reflected the recorded statement he had previously given. The court further ordered the state to make available to the defendant the person who had transcribed the statement from the recording. The defense did not avail itself of either of these opportunities. Under these circumstances, we cannot conclude that the court erred in denying the defendant's motion to strike Shaw's testimony. Granting such a motion "would be a heavy sanction to the government for loss of a piece of evidence on which there was other primary evidence." *State* v. *Shaw*, supra, 386, citing *United States* v. *Miranda*, 526 F.2d 1319, 1324 (2d Cir. 1975), cert. denied, 429 U.S. 821, 97 S. Ct. 69, 50 L. Ed. 2d 82 (1976).

There is no error.

In this opinion the other judges concurred.

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NO. A.C. 2073

STATE OF CONNECTICUT : APPELLATE COURT

v. : STATE OF CONNECTICUT

MEYER BILLER JANUARY 29, 1986

O R D E R

The motion of the defendant filed December 26, 1985, to reargue,

Having been presented to the Court, it is hereby

O R D E R E D Denied.

BY THE COURT,
FRANCIS J. DRUMM, JR.
Chief Clerk

Assistant Clerk-
Appellate

Notice sent: 1/29/86

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discretion." (Citations omitted.) *State* v. *Briggs*, 179 Conn. 328, 332-33, 426 A.2d 298 (1979), cert. denied, 447 U.S. 912, 100 S. Ct. 3000, 64 L. Ed. 2d 862 (1980); see also *State* v. *Miller*, 186 Conn. 654, 670-71, 443 A.2d 906 (1982); *State* v. *Hogan*, 180 Conn. 182, 183, 429 A.2d 462 (1980). At the same time, a trial court should take care to prevent the introduction of evidence that has little or no probative value and which would reasonably tend to inflame the jury. See *State* v. *Hogan*, supra; *State* v. *Onofrio*, 179 Conn. 23, 32-33, 425 A.2d 560 (1979); *State* v. *Runkles*, 174 Conn. 405, 413, 389 A.2d 730, cert. denied, 439 U.S. 859, 99 S. Ct. 177, 58 L. Ed. 2d 168 (1978).

In the present case, Coles testified that she placed her children in foster homes because she "wasn't financially and mentally able to take care of them, at that point in my life." The witness' mental competency was clearly relevant to her credibility. Therefore, while testimony regarding the placement of one's children in foster homes might be more prejudicial than probative in some instances, we cannot conclude that the court abused its discretion in ruling as it did. *State* v. *Miller*, supra; *State* v. *Martin*, 170 Conn. 161, 166, 365 A.2d 104 (1976).

There is no error.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MEYER BILLER
(9727)

SPEZIALE, C. J., PETERS, PARSKEY, SHEA and GRILLO, Js.

The defendant notary public, convicted of falsely certifying that he had administered oaths (§ 53-368) on two insurance company proof of loss forms, appealed. *Held:*

1. The trial court erred in admitting into evidence certain statements made by the defendant to a one-man investigative grand jury, those statements having been compelled in violation of his fifth amendment privilege against self-incrimination.

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2. The trial court did not err in determining that the oaths which the defendant falsely certified that he had administered were "required by law," a prerequisite to a conviction under § 53-368.

(One judge dissenting)

3. The defendant's claim that he was deprived of his sixth amendment right to counsel by the trial court's admission into evidence of tape recorded conversations he had had with a police informant following his earlier arrest on charges of criminal mischief and of aiding larceny was not persuasive; one charged with one offense is not immunized from accountability for statements he subsequently makes which tend to prove another offense.

4. The trial court did not err in refusing, on the ground that a proper foundation had not been laid, to admit into evidence certain expert testimony proffered by the defendant.

Argued March 8—decision released July 5, 1983

Information charging the defendant with two counts of the crime of falsely certifying as to the administration of an oath, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Schaller, J.*; verdict and judgment of guilty and appeal by the defendant to this court. *Error; new trial.*

M. Mitchell Morse, with whom, on the brief, were *Howard A. Jacobs* and *Karen F. Tross*, for the appellant (defendant).

Julia D. Dewey, assistant state's attorney, with whom, on the brief, were *Arnold Markle*, state's attorney, and *Mary M. Galvin*, assistant state's attorney, for the appellee (state).

PARSKEY, J. The defendant, Meyer Biller, a licensed public adjuster and a notary public, was charged in a two-count information with falsely certifying two oaths in violation of General Statutes § 53-368. The case was tried to a jury and the defendant was found guilty on both counts. The court imposed consecutive eighteen month to three year sentences on each count for a total

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effective sentence of not less than three, nor more than six years, from which judgment the defendant has appealed.

Although the testimony was contradictory, the jury could reasonably have found the following facts: On April 13, 1975, and April 18, 1975, suspicious fires heavily damaged an apartment building located at 66-68 Norton Street in the city of New Haven. The property was an asset of the Bridgehaven Corporation, a closely held corporation controlled by Peter and Marilyn Cappola.

Peter Cappola, a key state's witness, had insured the property for approximately $580,000. Prior to the date of the fires, the Cappolas had retained the defendant for the purpose of settling claims with insurance companies. Also prior to the date of the April 13, 1975 fire, Peter Cappola advised Biller that a fire would in fact occur. Cappola admitted setting the April 13, 1975 fire, but denied any involvement in the April 18, 1975 fire.

Biller proceeded to adjust claims arising out of both fires. He and his son, Lawrence Biller, prepared a detailed survey itemizing the damage and replacement costs. Before the expiration of the deadline for filing proofs of loss with the insurance company, Biller provided Peter Cappola with two proof of loss forms and instructed Cappola to take them home and get his wife's signature. Cappola took the forms home. There the Cappolas signed one blank form for each fire. These signed but otherwise blank forms were then submitted to the defendant's office. The Cappolas were unaware of the amounts claimed in the proofs of loss until after their submission to the insurer. Neither Peter nor Marilyn Cappola took an oath concerning the claims submitted.

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Gerald Hale, the insurance company adjuster, received the proofs with a cover letter from the defendant and sent them on to the insurer. When Hale received the proof of loss statements, they were completely filled in with no blank lines remaining on the forms. The forms were signed by the defendant as a notary. The damages claimed were $538,180.58 for the April 13 fire and $123,206.60 for the April 18 fire. Hale, who had examined the Norton Street structure soon after both fires and on subsequent occasions, considered the claims excessive. It was Hale's opinion that $225,000.00 and $75,000.00 were proper figures for the first and second fires respectively. Additionally there was evidence that the defendant had inflated the figures by twenty percent and that he had charged a fee of ten percent of the settlement.

The defendant has pressed seven claims of error on appeal. At issue is (1) whether the trial court erred in admitting into evidence, for the purpose of rebuttal, statements allegedly compelled from the defendant by an investigative grand jury; (2) whether the oath on a proof of loss form is one required by law as is necessary to sustain a conviction pursuant to General Statutes § 53-368; (3) whether the defendant's right to counsel was violated when the police secretly recorded his conversations after he had been arrested and had retained counsel for other charges arising out of the same grand jury investigation; (4) whether testimony offered by the defendant concerning structural replacement cost was properly excluded from evidence; (5) whether evidence of the usual practice within the insurance industry regarding damage estimates offered by the defendant was properly excluded; (6) whether the court erred in restricting the defendant's cross-examination of two government witnesses and (7) whether the court properly charged the jury.

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I

The defendant claims that the trial court erred in admitting into evidence, for the purpose of rebuttal, statements allegedly compelled from the defendant by an investigative grand jury.

In contradiction of the testimony of Marilyn and Peter Cappola, the defense offered the testimony of Florence Biller and Lawrence M. Biller (the defendant's wife and son), corroborated in part by other witnesses. Lawrence Biller testified that the Cappolas signed duplicate sets of proofs of loss at the defendant's office where the defendant notarized them. On cross-examination, Lawrence Biller was questioned about the ordinary course of business at Biller Associates concerning the filling out and execution of proofs of loss. He stated that they ordinarily filled out an original plus one — one for the insurance company and one for their records. He denied that it was the usual course to have them filled out, including the notary date, prior to signing and stated that the Cappola proofs had been filled out except for the date, before signing.

The state, in rebuttal, offered two excerpts[1] from the defendant's testimony before Judge Levine sitting as

[1] The defense had offered testimony in contradiction of Peter and Marilyn Cappola. Thereafter, in rebuttal, the state introduced, over objection and exception, two statements made by the defendant when he testified before an investigating grand jury. The statements, in the form of excerpts from the grand jury transcript, were introduced as a state's exhibit and were as follows:

(3/3/76)

"Q. So was it common procedure for the corporation, I'm asking you, Sir, to get blank proof of losses signed not indicating for what date or what area or what type of occurrence?

"A. It happens."

(3/4/76)

"Q. Do you normally have Proofs of Loss that are unfilled in signed by the insured and acknowledged by you?

"A. Mr. Markle, I don't normally have anything. I do things many

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a one man grand jury investigating incidents of arson in the New Haven area. The defendant had been subpoenaed to the grand jury to produce his corporate records.[2] Biller appeared before the grand jury on nine different days between October 9, 1975, and March 12, 1976. When questioned about his own activities on behalf of the corporation, Biller asserted his constitutional privilege against self-incrimination. The grand juror ordered him to answer the questions because they involved actions which the defendant might have taken in a corporate capacity regardless of whether the answers would implicate the defendant personally. This ruling was established by Judge Levine on the defendant's first day of testimony before the grand jury and was reaffirmed on every subsequent day of testimony up to and including March 2, and March 4, when the defendant gave the statements that were later introduced at trial.

On appeal the defendant claims that the trial court erred in admitting statements allegedly compelled from the defendant by the investigative grand jury in violation of his fifth amendment rights. In his brief the defendant adopts a two stage analysis. First, the defendant asserts that the grand juror erred when he ordered Biller to give incriminating testimony about his own activities on behalf of the corporation; and second, the defendant argues that the trial court erred in finding that the admitted statements were not involuntary or compelled under the circumstances.

The state does not seriously challenge the first step of the defendant's analysis. The state contends, however, that the defendant waived his fifth amend-

different ways. The only purpose of the way I work and do things is from my memory, from my recollection, from my records, and for me to know and for my purposes, not for any other purpose."

[2] Biller Associates is a close corporation. At the time of the grand jury investigation the defendant was the president of the corporation.

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ment right by failing to raise the privilege prior to giving the statements that were later introduced at trial. The state does not concede that the grand juror's alleged error necessarily rendered the defendant's statements inadmissible at trial.

The privilege against compulsory self-incrimination extends to proceedings before a grand jury. *State* v. *Kemp*, 126 Conn. 60, 72, 9 A.2d 63 (1939). The federal fifth amendment standards were made applicable to the states in *Malloy* v. *Hogan*, 378 U.S. 1, 11, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964); *State* v. *Simms*, 170 Conn. 206, 209, 365 A.2d 821, cert. denied, 425 U.S. 954, 96 S. Ct. 1732, 48 L. Ed. 2d 199 (1976). "[The fifth amendment] can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosure that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar* v. *United States*, 406 U.S. 441, 444-45, 92 S. Ct. 1653, 32 L. Ed. 2d 212, reh. denied, 408 U.S. 931, 92 S. Ct. 2478, 33 L. Ed. 2d 345 (1972).

That a corporation has no fifth amendment privilege is long established and is not disputed here. See *Hale* v. *Henkel*, 201 U.S. 43, 26 S. Ct. 370, 50 L. Ed. 652 (1906). Nor is it seriously questioned that the grand juror erred when he compelled the defendant to answer questions in his "corporate capacity" where the answers may have been personally incriminating to the defendant. The determinative law was enunciated by the United States Supreme Court in *Curcio* v. *United States*, 354 U.S. 118, 77 S. Ct. 1145, 1 L. Ed. 2d 1225 (1957).[3] Therein, the court stated that "A custodian,

[3] In *Curcio* v. *United States*, 354 U.S. 118, 77 S. Ct. 1145, 1 L. Ed. 2d 1225 (1957), the United States Supreme Court reversed a contempt conviction holding that the custodian of a union's books and records who had failed to produce them before a federal grand jury pursuant to a subpoena, could, on fifth amendment grounds, lawfully refuse to answer questions asked by the grand jury as to the whereabouts of the books and records. See *United States* v. *Rylander*, 460 U.S. 752, 103 S. Ct. 1548, 75 L. Ed. 2d 521 (1983).

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by assuming the duties of his office, undertakes the obligation to produce the books of which he is custodian in response to a rightful exercise of the State's visitorial powers. But he cannot lawfully be compelled, in the absence of a grant of adequate immunity from prosecution, to condemn himself by his own oral testimony." Id., 123-24. The court, citing *Wilson* v. *United States*, 221 U.S. 361, 385, 31 S. Ct. 538, 55 L. Ed. 771 (1911), further noted that: " 'They [the custodians of corporate records] may decline to utter upon the witness stand a single self-criminating word. They may demand that any accusation against them individually be established without the aid of their oral testimony or the compulsory production by them of their private papers.' " (Bracketts in original.) Id., 124. The defendant as the president of Biller Associates had voluntarily assumed a duty which overrode his claim of privilege *only* with respect to the production of the corporate records themselves. The grand juror, therefore, erred by compelling incriminating oral testimony from the defendant in his "corporate capacity."

We turn now to the second stage of the defendant's analysis. The defendant claims that the trial court erred in admitting statements compelled from him by the grand jury in violation of his fifth amendment rights. The state claims that the defendant waived his fifth amendment privilege by failing to raise it by objection prior to giving the two statements that were later admitted at trial. The trial court found that the defendant's statements were not involuntary or compelled under the circumstances.

Based on our examination of the grand jury transcript, it is indisputable that Biller raised his fifth amendment privilege on numerous occasions during the course of his testimony. Further, it is indisputable that

the grand juror continuously sustained the privilege personally but ordered Biller to answer in his "corporate capacity."[4] Although only two brief excerpts of

[4] The following excerpts are typical of what transpired throughout Biller's grand jury testimony:

(10/16/75)

"The Court: Well, as I understand the issue which Mr. Markle is raising this, in his corporate capacity there exists no privilege, am I correct? Is that your argument?

"Mr. Markle: Yes, your Honor.

"The Court: In the corporate capacity, there is no privilege which exists for records, certainly, and for any action which he may have taken in the corporate capacity."

(3/2/76)

"[By Mr. Markle:] Did you have a conversation with Nardini about burning George Street?

"[Mr. Biller:] I won't answer that.

"Q. Did you ever have a conversation with Nardini in your corporate capacity as to how George Street had come to be burned?

"A. I won't answer that, Your Honor. That would reflect on individual integrity and everything else and I will repeat, as I said before, it's a closed corporation, the operation and intermingling between personalities, corporate is so fine a line that anything that can be possibly be interpreted to be incriminating in any way, I would invoke the Fifth Amendment.

"The Court: Yes. Well, you're not allowed to invoke the Fifth Amendment on behalf of the corporation. The question is asked on behalf of the corporation. You will have to answer it.

"The Witness: Then the corporation will have to speak for itself.

"The Court: You're the corporation, you speak for it.

"The Witness: I'm an employee.

"The Court: As far as you know, did the corporation ever have a discussion with Mr. Nardini with respect to burning George Street?"

(3/3/76)

"Q. In terms of those two checks, Mr. Biller, did the corporation pay $5,500 to Mr. Grudberg? What business did it have with Mr. Grudberg, the corporation?

"A. Your Honor, I again would take the Fifth Amendment on behalf of the corporation unless the State's Attorney can show that it's germane to this investigation.

"The Court: Now, please, whether it's germane to the investigation is not the question. The only question that you have a right to object to is one which involves you in a crime. This is the corporation. It does not have the protection of the Fifth Amendment, therefore, you will have to answer the question.

"The Witness: Your Honor, if I might state further:

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Biller's testimony were later admitted at trial, our review necessarily requires that we examine the statements in context. The first question and answer incorporated in the state's exhibit occurred during Biller's testimony before the grand jury on March 3, 1976. The statement and the colloquy immediately preceding and following are set out in the footnote below.[5] During his colloquy the state's attorney ques-

"The Court: Yes, go right ahead.

"The Witness: Some transactions in that checkbook and this, for one, takes place at my personal direction, therefore I'm answerable to it personally and on that basis I will take the Fifth Amendment on answering that question.

"The Court: You take it personally. Now, you answer on behalf of the corporation, what were those checks issued for?

"The Witness: They were issued at the direction of Meyer Biller."

[5] The following is an excerpt from the defendant's testimony before the grand jury on March 3, 1976. The italicized excerpts were subsequently incorporated in an exhibit that was introduced by the state, in rebuttal, at the defendant's criminal trial.

By Mr. Markle:

"Q. The proof of loss. The statement of proof of loss. You now handed me—that's two. All right, the one statement in proof of loss. Incidentally, Sir, in this file, there are in addition to that, I want you to see—will you hold those so I can open the file. There is a statement, proof of loss on the Meyer Associates.

"A. On the Biller Associates.

"Q. I'm sorry, on the Biller Associates, Licensed Adjustor. That's signed by Mr. Nardini, proof of loss, right, as president?

"A. That's correct.

"Q. It's from your file?

"A. D J Investments, Incorporated, by Dante Nardini.

"Q. It's in your file?

"A. Correct.

"Q. What's that got reference to, what fire?

"A. I don't know.

"Q. What vandalism?

"A. I don't know.

"Q. Do you normally walk around with a blank signed proof of loss?

"A. It depends.

"Q. Is that a common practice to get a series of proof of losses signed by a client?

"A. Are you talking about the corporation obtaining them?

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tioned Biller about what appeared to be two signed blank proof of loss forms in a Biller Associates file. When asked about the first blank signed proof of loss, Biller claimed his fifth amendment privilege personally. The state's attorney then questioned Biller about the actions of the corporation and Biller answered. Biller was then asked as a "corporate officer" if the proof of loss came from the Biller Associates file; to which he responded affirmatively. The state's attorney then asked the question that along with Biller's answer was later introduced at trial:

"So was it common procedure for the corporation, I'm asking you, Sir, to get blank proof of losses signed not indicating for what date or what area or what type of occurrence?"

"A. It happens."

Immediately thereafter Biller was asked if it (the proof of loss) was in anticipation of something happening. Biller objected and the grand juror ordered him to answer in his "corporate capacity."

"Q. Let's take you, first, do you claim the Privilege on that?
"A. I claim the Privilege.
"Q. Now, how about the corporation?
"A. It happens.
"Q. Well, it happened here.
"A. For various reasons.
"Q. What?
"A. I see it here. There it is. It speaks for itself.
"Q. That's from your file, isn't it?
"A. It speaks for itself.
"Q. There's no question that was in the Biller Associates file?
"A. It speaks for itself. It's there.
"Q. Sir, I'm asking you as a corporate officer, is that from the Biller Associate file?
"A. You're showing me the file. It's coming out of the file. It apparently is.
"Q. And there is a second one that's blank, isn't there?
"A. Correct.
"Q. That also came out of the file?
"A. Correct.
"Q. *So was it common procedure for the corporation, [illegible] Sir.*

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Clearly this entire colloquy was infected by the grand juror's erroneous ruling on the applicability of Biller's fifth amendment privilege. That Biller was compelled to incriminate himself is manifest.[6] " '[A] witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. *Kastigar* v. *United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 [reh. denied, 408 U.S. 931, 92 S. Ct. 2478, 33 L. Ed. 2d 345] (1972). Absent such protection if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution. *Bram* v. *United States*, [168 U.S. 532, 18 S. Ct. 183, 42 L. Ed. 568 (1897)]; *Boyd* v. *United States*, [116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886)]'; *Lefkowitz* v. *Turley*, 414 U.S. 70, 78, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973)." *Garner* v. *United States*, 424 U.S. 648, 653, 96 S. Ct. 1178, 47 L. Ed. 2d 370 (1976).

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to get blank proof of losses signed not indicating for what date or what area or what type of occurrence?

"A. *It happens.*

"Q. What is it, in anticipation of something happening?

"A. I wouldn't say that, Your Honor. I would object to that question.

"The Court: Answer that question, in your corporate capacity.

"The Witness: It's in anticipation of nothing.

By Mr. Markle:

"Q. Well, then, Sir, what purpose would two proofs of loss both signed D J Investments, Inc. by Dante Nardini, Jr., President, have in a file with nothing else indicating no number, no policy, no date, no loss?

"A. At this point, I can't tell you why that's in there. I don't recall why it was done." (Emphasis added.)

[6] Even assuming arguendo that the specific question and answer later admitted at trial were not the specific subject of a fifth amendment claim by Biller we would reach the same result. It is obvious that, at this stage of the proceeding, there was no fifth amendment claim which Biller could have made that had any prospect of being fully honored. It was perfectly clear from the previous rulings of the court that any such claim would be futile. Under the circumstances, Biller's failure to claim the privilege cannot reasonably be interpreted as a waiver. *State* v. *Higgs*, 143 Conn. 138, 145, 120 A.2d 152 (1956); see *Krause* v. *Almor Homes, Inc.*, 147 Conn. 333, 336, 160 A.2d 753 (1960).

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Because we find that admitting Biller's March 2 statement in his subsequent trial was error, we need not consider the admission of the March 4 statement as it was an inseparable component of the state's exhibit. Further, it is apparent that the improperly admitted evidence contradicted the testimony of the defense witnesses on one of the central issues . . the case, namely, whether the proofs of loss were signed by the Cappolas at home, in blank, or in front of the defendant in his office. Because it is evident from our examination of the record and transcript that credibility was crucial in this case; *State* v. *Ouellette*, 190 Conn. 84, 103-104, 459 A.2d 1005 (1983); we cannot say that the error was harmless.

II

By amended jury information the defendant was charged, pursuant to General Statutes § 53-368, with two counts of falsely certifying that he had administered an oath to Marilyn Cappola, on sworn statements in proof of loss filed with the Affiliated F.M. Insurance Company of Rhode Island. It was further alleged that the sworn statements in proof of loss were required by General Statutes § 38-98. In his second claim of error, the defendant asserts that the oath on the proof of loss form contemplated by the particular insurance policy involved herein is not one "required by law" necessary to sustain a conviction pursuant to General Statutes § 53-368.[7] The state maintains,

[7] "[General Statutes] Sec. 53-368. FALSELY CERTIFYING AS TO ADMINISTRATION OF OATH. Any person authorized by the laws of this state to administer oaths and affirmations, who falsely certifies that an oath or affirmation has been administered by him to any person in any matter where an oath or affirmation is by law required or falsely certifies that any affidavit, deposition or written statement of any kind required by law to be made upon oath or affirmation has been sworn or affirmed to before him by the person making such affidavit, deposition or written statement in any case where the same is required by law to be made, shall be fined not more than one thousand dollars or be imprisoned not more than three years or both."

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however, that sections 38-99 (a)[8] and 38-98 mandate that a proof of loss in conjunction with a fire insurance policy be signed and sworn to by the insured.

[8] In pertinent part, General Statutes § 38-99 provides:

"Sec. 38-99. PROVISIONS OF POLICY OR CONTRACT. (a) No policy or contract of fire insurance shall be made, issued or delivered by any insurer or any agent or representative thereof, on any property in this state, unless it conforms as to all provisions, stipulations, agreements and conditions with the form of policy set forth in section 38-98. There shall be printed at the head of such policy the name of the insurer or insurers issuing the policy, the location of the home office thereof, a statement showing whether such insurer or insurers are stock or mutual corporations or are reciprocal insurers or Lloyd's underwriter, provided any company organized under special charter provisions may so indicate upon its policy and may add a statement of the plan under which it operates in this state, and there may be added thereon such device or devices as the insurer or insurers issuing such policy desire. Such policy shall be clearly designated on the back of the form as "The Standard Fire Insurance Policy of the State of Connecticut"; and this designation may include the names of such other states as have adopted this standard form. The standard fire insurance policy provided for in section 38-98 need not be used for effecting reinsurance between insurers. If the policy is issued by a mutual, cooperative or reciprocal insurer having special regulations with respect to the payment by the policyholder of assessments, such regulations shall be printed upon the policy and any such insurer may print upon the policy such regulations as are appropriate to or required by its form of organization. Insurers issuing the standard fire insurance policy pursuant to section 38-98 are authorized to affix thereto or include therein a written statement that the policy does not cover loss or damage caused by nuclear reaction or nuclear radiation or radioactive contamination, all whether directly or indirectly resulting from an insured peril under such policy; provided nothing herein contained shall be construed to prohibit the attachment to any such policy of an endorsement or endorsements specifically assuming coverage for loss or damage caused by nuclear reaction or nuclear radiation or radioactive contamination.

"(b) Any policy or contract which includes, either on an unspecified basis as to coverage or for an indivisible premium, coverage against the peril of fire and substantial coverage against other perils need not comply with the provisions of subsection (a) hereof, provided (1) such policy or contract shall afford coverage, with respect to the peril of fire, not less than the substantial equivalent of the coverage afforded by said standard fire insurance policy, (2) the provisions in relation to mortgagee interests and obligations in said standard fire insurance policy shall be incorporated therein without change, (3) such policy or contract is complete as to all of its terms without reference to any other document and (4) the commissioner is satisfied that such policy or contract complies with the provisions hereof."

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The defendant advances three principal contentions. He argues that because the insurance commissioner can, pursuant to General Statutes § 38-99 (b), approve insurance policies not utilizing the standard form, the oath set forth in § 38-98 is not required by law. He also contends that the requirement in the standard form fire insurance policy that the proof of loss be sworn to is only a model contract provision, not a matter required by law for § 53-368 purposes and that after acceptance by the parties a policy of fire insurance in the form prescribed by the legislature is not to be treated as a legislative enactment but rather as a private contract. He contends finally that because the insurance company can waive the proof of loss requirement the oath set forth in § 38-98 is not required by law.

In order to analyze the defendant's first contention we must establish the statutory framework. Section 53-368 prohibits the false certification of an oath that is required by law. See *State* v. *Tedesco*, 175 Conn. 279, 397 A.2d 1352 (1978). General Statutes § 38-98[9] sets

[9] Section 38-98 of the General Statutes provides in relevant part:

"Requirements in case loss occurs. The insured shall give immediate written notice to this Company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claims; AND WITHIN SIXTY DAYS AFTER THE LOSS, UNLESS SUCH TIME IS EXTENDED IN WRITING BY THIS COMPANY, THE INSURED SHALL RENDER TO THIS COMPANY A PROOF OF LOSS, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be

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forth the standard form fire insurance policy for the state of Connecticut. Section 38-99 (a) provides, inter alia, that "[n]o policy or contract of fire insurance shall be made, issued or delivered by any insurer or any agent or representative thereof, on any property in this state, unless it conforms as to all provisions, stipulations, agreements and conditions with the form of policy set forth in section 38-98. . . ." Section 38-99 (b), however, excludes certain fire insurance policies from the ambit of §§ 38-99 (a) and 38-98, if those policies meet the requirements set forth in § 38-99 (b) to the satisfaction of the insurance commissioner. Only policies which either on an unspecified basis as to coverage or for an indivisible premium provide coverage against the peril of fire and substantial coverage against other perils are eligible for inclusion in § 38-99 (b). In order to be relieved from compliance with § 38-98 these policies (1) must afford coverage with respect to the peril of fire not less than the substantial equivalent of the coverage afforded by the standard fire policy; (2) must incorporate the provisions in relation to mortgagee interests and obligations as set forth in the standard policy without change; (3) must be complete as to all terms without reference to any other document; and (4) the commissioner must be satisfied that the policy complies with these requirements.[10] See General Statutes § 38-99 (b).

reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same, and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made."

[10] We do not perceive the commissioner's function as merely ministerial. We doubt that the commissioner would abuse his discretion by refusing to approve a policy pursuant to General Statutes § 38-99 (b) that failed to provide the substantial equivalent of the standard policy. By way of example only, if a policy were to contain a provision that the insurer would not have to pay a loss for six months rather than the sixty days provided by the standard form, the commissioner would not be obliged to approve it.

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The defendant claims that because the insurance commissioner can approve insurance policies not in compliance with the standard form, the oath prescribed by that form is not required by law for § 53-368 purposes. We are unpersuaded. Assuming without deciding that the insurance policy herein involved met the first three requirements enumerated in § 38-99 (b), the record before us provides no indication that the policy satisfies the fourth criteria, viz., there is no showing that the insurance commissioner is satisfied that the policy complies with § 38-99 (b). This would preclude the operation of § 38-99 (b) in the present case.

It follows, therefore, that the instant policy falls within § 38-99 (a) which provides that "[n]o policy or contract of fire insurance shall be made, issued or delivered by an insurer or any agent or representative thereof, on any property in this state, unless it conforms as to all provisions, stipulations, agreements and conditions with the form of policy set forth in section 38-98. . . ." The defendant gains nothing on this claim.

The defendant next claims that § 38-98 establishes only a model contract provision and is not to be treated as a legislative enactment once the policy has been accepted by the parties. He asserts that on this basis the oath set out in § 38-98 cannot be by law required for the purposes of a prosecution pursuant to § 53-368. In support of this contention the defendant cites a series of older cases. Principally the defendant relies on the decisions in *Shawnee Mut. Fire Ins. Co.* v. *School District*, 44 Okl. 3, 143 P. 194 (1914), *Reed* v. *Washington Fire & Marine Ins. Co.*, 138 Mass. 572 (1885), and *Dunton* v. *Westchester Fire Ins. Co.*, 104 Me. 372, 71 A. 1037 (1908). These cases establish the general proposition that " '[a] policy of fire insurance in the standard form prescribed by . . . [the

legislature] . . . is not to be treated as a legislative enactment after it has been accepted by the parties, but as a voluntary contract, which, like any other contract, derives its force and efficacy from the consent of the parties . . . .' " *Shaunee Mut. Fire Ins. Co.* v. *School District*, supra, 8; see *Reed* v. *Washington Fire & Marine Ins. Co.*, supra, 577; *Dunton* v. *Westchester Fire Ins. Co.*, supra, 378.

We find these cases to be inapposite. As a preliminary observation we note that all of the above-referenced cases as well as our own decisions indicate that the provisions of the standard policy are required or prescribed by law. In *Shaunee Mut. Fire Ins. Co.* v. *School District*, supra, the court (p. 8) noted that "[t]he terms and provisions of the standard policy of fire insurance, the use of which is *required by legislative enactment*, are to be considered as employed in the sense in which they were used and interpreted by the courts before that form of policy was adopted." (Emphasis added.) The court in *Reed* v. *Washington Fire & Marine Ins. Co.*, supra, 577, noted that "it is not to be presumed that the Legislature intended, *by prescribing the form of contract*, and prohibiting any other, to give it effect in depriving a party of rights which, as a contract, it would not have." (Emphasis added.) In *Dunton* v. *Westchester Fire Ins. Co.*, supra, 378, the court indicated that the Maine standard policy was "prescribed by statute." Finally this court, in *Covenant Ins. Co.* v. *Banks*, 177 Conn. 273, 277-78, 413 A.2d 862 (1979), stated that the appraisal clause set forth in General Statutes § 38-98 was both "required" and "mandated" to appear in a contract of fire insurance. See also General Statutes § 38-99 (a).

The cases cited by the defendant focus not on whether the standard policy is required by law, indeed they assume that fact, but rather on how the particular

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policy is to be interpreted, viz., either in terms of statutory construction or contract law. Faced with that issue the cases have determined only that the standard policy is to be interpreted as a contract and not a statute. The decisions determine nothing more. On the contrary, they are strong authority for the proposition that the terms of § 38-98 are required by law.

The defendant's final assertion is that because the insurance company could waive the proof of loss, the oath thereon is not one required by law. Based on our decision in *State* v. *Tedesco*, supra, 285–87, we reject this claim. In *Tedesco* the defendant was charged pursuant to § 53-368 with falsely certifying the administration of an oath on an application for the renewal of a liquor permit. The defendant in *Tedesco* claimed that if the liquor permit renewal application was insufficient or defective for any reason, the liquor commission would lack jurisdiction to act on the renewal in which case the oath in question would not be required by law. The court found this position to be untenable. The court noted that where the permit was valid as to the commission, the club and the permit holder because the parties had agreed to the procedure, the defendant (who had notarized the permit application) had no standing to object because when making the certification he knew the application would be filed with the commission for action thereon.

Likewise, we conclude that the defendant in the present case is without standing to object. He cannot raise the insurance company's right to waive the proof of loss as a defense. The insurer and the insured were acting pursuant to an agreed upon contractual procedure. The defendant was not a party to this contract. The proof of loss was submitted to the insurance company in accordance with the policy. The proofs of loss were certified with knowledge that they would be forwarded

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to the insurer and, indeed, the defendant himself sent the forms to the insurer. *State* v. *Tedesco*, supra, 287.

Our limited holding, therefore, is that the oath prescribed by General Statutes § 38-98 is one required by law for the purposes of a prosecution pursuant to General Statutes § 53-368.

III

Because they are likely to arise at retrial, we consider the defendant's remaining claims of error. The defendant next urges that his right to counsel guaranteed by the sixth amendment to the United States constitution and article first, § 8 of the constitution of Connecticut was violated when his conversations were secretly recorded after he had been arrested and retained counsel for other charges arising out of the same grand jury investigation.

In February, 1977, the grand juror filed with the court his report of the investigation of fires, thefts and vandalisms which had occurred in eighteen New Haven buildings. Relying on this report, the state applied for a warrant charging the defendant with criminal mischief and aiding a larceny in connection with the burning of a building at 80 Winchester Avenue in the city of New Haven. The warrant was issued on March 23, 1977, and the defendant was arrested on March 29, 1977. Counsel entered an appearance for the defendant on March 29, 1977.

In April, 1977, after Biller's arrest on the criminal mischief and larceny charges, he was engaged by Peter Cappola in a conversation while Cappola was wearing a "body mike." Cappola was acting in concert with the police. This conversation was recorded and transcribed by the police. Thereafter, the state, in November, 1977, relying on the grand juror's report, sought and obtained

a warrant for the defendant's arrest on the charges that he falsely certified the administration of oaths. The warrant was issued on November 16, 1977, and the defendant was immediately arrested. Defense counsel appeared in that case on November 21, 1977. During the defendant's trial on the false oath charges, portions of the transcripts and the tapes of the Biller-Cappola conversations relating to the Norton Street fires were admitted into evidence over the defendant's objection.

The defendant claims that incriminating statements were elicited from him after the start of adversary criminal proceedings and after he had retained counsel. He asserts that since the grand jury report provided all of the basis necessary to establish probable cause for the criminal mischief, aiding larceny and false oath charges, the state violated his right to counsel by eliciting statements from him through an informant after he had been arrested and had obtained counsel on the criminal mischief and aiding larceny charges. The defendant maintains that, in view of the factual background of the grand jury investigation, the false oath charges were not separate and distinct matters.

We find these claims unpersuasive.[11] "The right to counsel attaches 'at or after the initiation of adversary

[11] To the extent that the defendant is suggesting that he had a right to be arrested for all charges arising from the grand jury investigation at the same time, he is in error. "There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the fourth amendment if they act too soon, and a violation of the sixth amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction." *Hoffa* v. *United States*, 385 U.S. 293, 310, 87 S. Ct. 408, 17 L. Ed. 2d 374, reh. denied, 386 U.S. 940, 951, 87 S. Ct. 970, 17 L. Ed. 2d 880 (1966); *United States* v. *Marion*, 404 U.S. 307, 325n, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971). Nor are the police required to reveal all their cards in an application for an arrest warrant.

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judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' *Kirby* v. *Illinois*, 406 U.S. 682, 688-89, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972)." *State* v. *Ledbetter*, 185 Conn. 607, 609, 441 A.2d 595 (1981).

Unlike *Massiah* v. *United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), the present case does not involve the use of incriminating statements made by an indicted defendant out of the presence of counsel to prove the charges pending against the defendant. Rather, the evidence of the conversations taped after Biller's arrest was used as proof in the later charged false oath prosecution. *Massiah* and its progeny establish that constitutional rights are violated where the government covertly gathers admissions of some past wrongdoing of which a suspect already stands accused, while different or subsequent criminal acts may be secretly investigated even though the target is under suspicion of another earlier crime. *United States* v. *Calhoun*, 669 F.2d 923, 925 (4th Cir.), cert. denied, 456 U.S. 946, 102 S. Ct. 2014, 72 L. Ed. 2d 469 (1982); see *United States* v. *Capo*, 693 F.2d 1330, 1339 (11th Cir. 1982); *United States* v. *Missler*, 414 F.2d 1293, 1303 (4th Cir. 1969), cert. denied, 397 U.S. 913, 90 S. Ct. 912, 25 L. Ed. 2d 93 (1970); *United States* v. *Diamond*, 492 F. Sup. 583, 586 (D. Md. 1980), aff'd, 660 F.2d 996 (4th Cir. 1981).

Massiah offers no basis for the exclusion of testimony relating to uncounseled, post-indictment statements that involved criminal acts or constituted criminal acts in themselves. Such statements, even though elicited by government agents after indictment and in the absence of counsel, may form the basis for a separate or superseding indictment and may be offered to prove such additional charges. *United States* v. *Osser*, 483

F.2d 727, 730-34 (3d Cir.), cert. denied, 414 U.S. 1028, 94 S. Ct. 457, 38 L. Ed. 2d 321 (1973); *United States* v. *Missler*, supra, 1302-1303. A defendant indicted for one offense is not immunized from accountability for statements uttered subsequently tending to prove another crime. *United States* v. *Calhoun*, supra, 925.

Nor are we persuaded by the defendant's claim that the false oath charges were not separate and distinct from the earlier criminal mischief and aiding larceny charges because they all arose out of the same grand jury investigation and report. The false oath charges encompassed the defendant's alleged false certification of an oath on proof of loss forms signed by Peter and Marilyn Cappola relating to two fires which had occurred at 66-68 Norton Street in a building owned by the Bridgehaven Corporation, an entity controlled by the Cappolas. The premises were insured by the Affiliated F.M. Insurance Company of Rhode Island. The criminal mischief and aiding larceny charges, however, encompassed property damage and claims submitted therefor relating to property located at 80 Winchester Avenue, in a building owned by D & J Investments Incorporated of which Dante Nardini was president. The premises were insured by the Covenant Insurance Company. We cannot find that these different crimes involving different owners, different insurance companies, and different participants were not separate and distinct solely because the prosecution arose out of the same grand jury investigation. The evidence elicited from the defendant and subsequently admitted at trial did not violate the defendant's sixth amendment right to counsel.[12]

[12] In past decisions we have not specifically accorded the right to counsel guaranteed by article first, § 8 of the constitution of Connecticut a broader application than that guaranteed by the sixth amendment to the federal constitution. See *State* v. *Boulay*, 189 Conn. 106, 112-13, 454 A.2d 724 (1983); *State* v. *Derrico*, 181 Conn. 151, 167-69, 434 A.2d 356, cert. denied, 449 U.S. 1064, 101 S. Ct. 789, 66 L. Ed. 2d 607 (1980). Nor, given the circumstances of this case, are we inclined to consider whether the Connecticut constitution is to be so construed.

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IV

The defendant claims that the court erred when it excluded expert testimony proffered by the defense on the subject of the 1975 replacement cost of the Norton Street premises. The defendant's witness, Sabino Panca, indicated that he had viewed the structure in 1979. The court ruled that the defense had not laid a proper foundation for the admission of the expert testimony on the subject of the 1975 replacement cost of the building in that the defense had not demonstrated that the building was in the same condition when Panca viewed it as it was in 1975.

The trial court has wide discretion in ruling on the admissibility of expert testimony and this discretion is not to be disturbed unless that discretion has been abused, or the error is clear and involves a misconception of the law. *Going* v. *Pagani*, 172 Conn. 29, 35, 372 A.2d 516 (1976). An expert's knowledge must be directly applicable to the matter specifically in issue. *Going* v. *Pagani*, supra, 35; *Siladi* v. *McNamara*, 164 Conn. 510, 513-14, 325 A.2d 277 (1973). It is essential that the expert's personal knowledge or observation shall have been reasonably contemporaneous with the thing or occurrence in controversy; knowledge gained or observations made long subsequent thereto, after a material change of conditions is insufficient. 2 Jones, Evidence (6th Ed.) § 14:20, p. 638; *State* v. *Auclair*, 33 Conn. Sup. 704, 713-14, 368 A.2d 235 (1976).

Herein, there had been testimony earlier in the trial that the owner had expended just over $100,000 in the fall of 1976 "to completely remodel the building top to bottom." Even accepting, arguendo, the defendant's claim on appeal that because the insurance contract was a replacement policy only structural modifications were pertinent, we cannot conclude that the court abused

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its discretion, in light of the testimony, by requiring the defense to establish that the building was in substantially the same condition when Panca viewed it in 1979 as it was in 1975. The uncertainties in the essential facts were such as to make an opinion based on them without substantial value. *Sears* v. *Curtis*, 147 Conn. 311, 314-15, 160 A.2d 742 (1960); *Floyd* v. *Fruit Industries, Inc.*, 144 Conn. 659, 666, 136 A.2d 918 (1957).[13]

The defendant's further claim that he was barred from establishing a foundation for the admission of Panca's testimony is simply without merit. The witness, Panca, was asked whether there had been additions or deletions to the structure over the preceding ten years which could affect the replacement cost. Insomuch as the defense had failed to establish that the witness had been in the building before 1979, he was not competent to answer. The defendant was not, however, barred from producing this evidence through other witnesses; and, indeed, the court even suggested what was needed to establish a foundation.

Additionally, the defendant claims that error occurred during the cross-examination of an independent insurance adjuster, Gerald Hale, who testified on behalf of the state. As an expert witness, Hale gave two opinions apparently relevant to whether the defendant had the necessary intent to deceive. See *State* v. *Tedesco*, supra, 291. He testified (1) that the estimates of fire damage on the proofs of loss submit-

[13] We do not consider today's opinion to be in conflict with our decision in *F. P. Carabillo Construction Co.* v. *Covenant Ins. Co.*, 172 Conn. 564, 567-68, 375 A.2d 1029 (1977). That case involved a suit on a fire insurance policy. At issue was what damage was caused by fire and what damage was caused by vandalism and deterioration. On that issue the lapse of time between the fire and the inspection by the defendant's witness did not preclude the admissibility of his opinion. On the facts the court held that the time lapse, if anything, favored the plaintiff.

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ted by the defendant were excessive and (2) that his own much lower estimates were correct. On cross-examination he testified that it was "kind of usual" for public adjusters representing fire loss claimants to give estimates exceeding the estimates of fire losses which he would make on behalf of insurance carriers. A further question about the usual industry practice which is followed when such a disparity appears between the claimant and the insurer over the extent of the fire loss was excluded. The court also sustained the state's objection to additional inquiries about prior negotiations between the witness and the defendant over fire loss claims on other properties. The defendant excepted to these rulings upon the ground that the common practice of public adjusters to maximize fire loss estimates was not essentially different from that of lawyers who initially present claims of damages far in excess of the amounts they ultimately accept in settling those claims for their clients.

The defendant claims that the industry custom as followed in prior dealings between him and Hale under similar circumstances was relevant upon the issue of fraudulent intent. Because the state relied upon the fact that the damage estimates of the defendant were substantially higher than those of the witness, evidence of a common practice for public adjusters to overstate and for insurance company adjusters to understate such losses had some bearing on the question of intent. Because we have ordered a new trial we do not consider whether this ruling alone would constitute reversible error.

The defendant's remaining claims of error focus on an evidentiary ruling made by the court as well as the refusal of the court to charge as requested by the defendant. It is sufficient to note that we have exam-

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ined these claims carefully and conclude that they are without merit. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Cole*, 189 Conn. 518, 538, 457 A.2d 656 (1983).

General Statutes § 53-368 proscribes the false certification of an oath. The intent to deceive required by this statute relates to whether the oath or affirmation was sworn or affirmed before the defendant by the person making the affidavit, deposition or written statement. The evidence adduced at trial concerning the contents of the proofs of loss other than those portions relating to the oath and certification by the defendant, while relevant to show that the defendant's deception with respect to the oath was part of a greater deception to defraud the Cappolas' insurer, was not essential to establish violation of the statute. See *State* v. *Tedesco*, supra, 288–89.

There is error, the judgment is set aside and a new trial is ordered.

In this opinion SPEZIALE, C. J., PETERS and GRILLO, Js. concurred.

SHEA, J. (concurring and dissenting). I agree fully with Parts I, III and IV of the court's opinion. My disagreement is only with Part II of the opinion, which concludes that the oath upon the proof of loss form was "required by law" within the meaning of General Statutes § 53-368. I fail to comprehend how an oath on a proof of loss under a fire policy can be said to be "required by law" when General Statutes § 38-99 (b) provides that policies without a provision for an oath on a proof of loss are permissible if they contain the three essentials specified: (1) fire coverage equivalent to the standard fire policy; (2) the standard form provisions in relation to mortgagee interests and obligations; and (3) completeness as to all terms without

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reference to other documents. The fourth condition, that the commissioner be satisfied that the policy "complies with the provisions hereof," confines the discretion of the commissioner to ascertaining whether the prior three conditions have been met by the proposed policy. The commissioner would not be authorized to insist upon a provision for oaths upon proofs of loss, because such a provision could not reasonably be deemed necessary to implement fulfillment of the three essential requirements specified by § 38-99 (b), none of which pertains to proofs of loss.

Since it is optional for an insurance company to include a provision for an oath on a proof of loss in a policy after obtaining commissioner approval, which cannot be withheld merely because of the absence of an oath, such an oath is not "required by law." It cannot be contended that oaths which are called for only by the terms of an agreement are "required by law." The legislature obviously did not intend to include all oaths within the ambit of § 53-368, but imposed the "required by law" limitation so that it would apply only in those situations deemed sufficiently important to have induced the legislators to specify an oath as essential. Presumably those would involve circumstances where some strong public policy would be implemented by the requirement of an oath and would not include those where the requirement of an oath was thought desirable merely by the parties involved. By giving the insurer the right to omit the oath on a proof of loss and to sell fire policies with or without it, § 38-99 (b) has left the decision of whether to include such a provision in a policy entirely to the parties. Since the provision is no longer an essential ingredient of a fire policy, I do not see how it can be said to be "required by law," and would remand the case with direction to render judgment dismissing the information with prejudice.

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No. 22265

STATE OF CONNECTICUT : SUPERIOR COURT

v. : J.D. OF NEW HAVEN

MEYER BILLER AUGUST 15, 1984

MEMORANDUM OF DECISION ON MOTION TO DISMISS

The defendant faces a criminal prosecution under an information in two counts charging him with violations of Connecticut General Statutes 53-368, falsely certifying as to the administration of an oath. One of the elements of said crime, and the one that this motion directs itself to, is that the State must prove, as a part of a successful prosecution under this statute, that the oath is by law required.

The court heard testimony and received evidence which establishes that a policy of insurance was issued to Peter M. and

Marilyn Coppola. It can be accurately described as a special Multi-Peril "Apartment House Policy." This policy was issued for an effective period of February 1, 1974 to February 1, 1979. It provided property loss coverages with an aggregate limit of liability of $580,000. By endorsement, the repair/replacement limit was raised to $500,000 until February 1, 1977. The total premium was in the amount of $1594 and the only specification or breakdown of said premium was stated to be:

Real Property and Debris Removal	$1450
Rental Income	144
	$1594

This policy insured against all risks of direct physical loss to the property, subject to policy terms and conditions. It covered losses of real property, personal

property, machinery, apparatus, materials and supplies used with said real property; contractors' interests that the insured by prior contract had agreed to keep insured; debris removal; extra expense; valuable papers and records and incidental property removed from the premises for repair, service or exhibition. The all risk coverage afforded greatly exceeds the limited Fire, Lightning and Removal risks coverage mandated by §38-98.

This policy by its terms would pay for the actual cost of the replacement for any loss, up to the policy limits as specified. This coverage also exceeded the mininimum coverage mandated by §38-98.

Losses were suffered by the insureds and claims on their behalf were filed with the insurer. Proofs of loss were filed to

accomplish this. The central issue herein is whether or not these proofs of loss were required by law to be sworn to.

Connecticut General Statutes §38-98, as it existed at the appropriate times in 1975, spells out the mandatory form that a standard fire insurance policy should follow. This standard form policy mandates or contains coverage for direct loss suffered by fire, lightning and removal from premises endangered by such perils insured against. Section 38-102 further permits, as approved by the Commissioner, said standard form of fire insurance to be endorsed or extended coverages may be added thereto, adding perils insured against over and above those covered by the standard (statutory) fire insurance policy.

Section 38-99(a) provides that no

policy shall be made, issue or delivered unless it conforms to all the provisions set forth in §38-98, one of which statutorily mandated provisions being "... The insured shall render to this company a proof of loss, signed and sworn to by the insured..."(Emphasis added).

Section 38-99(B) provides that "any policy or contract which includes either on an unspecified basis as to coverage or for an indivisible premium, coverage against peril of fire and substantial coverage against other perils need not comply with the provisions of subsection (a) hereof, provided (1) such policy or contract shall afford coverage, with respect to the peril of fire, not less than the substantial equivalent of coverage afforded by said standard fire insurance policy, (2) the

provisions in relation to mortgagee interest and obligations in said standard fire insurance policy shall be incorporated therein without change, (3) such policy or contract is complete as to all of its terms without reference to any other document and (4) the Commissioner is satisfied that such policy or contract complies with the provisions hereof.

With respect to the policy in question, except for the endorsement of coverage insuring against loss of rental income, all remaining coverages are provided for upon the agreement to pay a premium that is indivisible as to the various risks insured against, and the various items of property insured thereunder. Further, said policy provides for substantial coverage against other perils. The coverages well exceed

the minimum required under §38-98.

The evidence establishes that the policy in question provides the substantial equivalent of the coverage afforded by the said standard insurance policy. The standard fire insurance policy provision in relation to mortgagee interests and obligations are incorporated without change. The policy is complete as to all of its terms without reference to any other document.

Under subpoena an authorized delegate of the Insurance Commissioner testified that the type of policy in question herein had been approved by the Commissioner on June 27, 1973. The court finds from the evidence that specific types of approvals under specific statutory provisions are not issued by the commissioner. He approves

under applicable statutes and regulations.

Thus when the witness says there was not a §38-99(B) approval given for this policy it is true, because the procedures of the Commissioner neither require applying for nor granting of such specific approvals. The Commissioner reviews and accepts or disapproves all policy form, endorsements,...used by property and casualty insurance companies. Regulations of Connecticut State Agencies §38-4-5(c)(1). These actions are taken under all applicable Regulations and Statutes.

The State contends that this situation represents a standard §38-98 fire policy with endorsements as permitted by §38-102. As such, a proof of loss would be required by law to be filed under oath as provided

by §38-98.

The defendant, in part, contends that this policy was issued and is utilized under the provisions of §38-99(B) and under said statute, it is not required by law that a proof of loss be under oath.

Statutes with respect to criminal prosecutions must be "strictly construed to protect the fundamental constitutional right to liberty." State v. Cook, 183 Conn. 520, 522 (1981); State v. Moore, 158 Conn. 461, 465 (1969); State v. Penner, 85 Conn. 481, 484 (1912). The court holds herein that the policy in question, under which the proofs of loss were filed were utilized and approved under the provisions of §38-99(B). The court further finds that the four conditions under said statute were met by the policy used herein and the

commissioner's action thereon. Therefore, a proof of loss filed thereunder is not required by law to be sworn to or under oath. Although it may be easily perceived that a mischief intended to be prevented may have occurred herein, such factor may not be regarded by this court in its construction of the applicable statutes. State v. Smith, 194 Conn. 213, 221 (1984). The court must look at the laws as drafted, not at its purported aim. Id.

The defendant advances certain other claims of constitutional dimension, claiming the statute to be void for vagueness, that this court abstains from considering in view of the disposition of the motion on statutory grounds.

Accordingly, the motion of the

defendant to dismiss is granted.

Higgins, J.

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No. CR6-193278

STATE OF CONNECTICUT : SUPERIOR COURT

V. : J.D. OF NEW HAVEN
at New Haven, G.A. 6

MEYER BILLER : NOVEMBER 12, 1982

MOTION IN LIMINE:
RE IMPEACHMENT BY PRIOR CONVICTIONS

The defendant respectfully requests that this Court order that the prosecuting authority be prohibited from admitting into evidence for the purposes of impeaching the credibility of Mr. Biller the fact that he had been previously convicted of a felony. The defendant requests that this Court rule on this motion prior to the initiation of trial.

In support of this motion, the defendant states:

1. Mr. Biller was convicted in the summer of 1979 of two counts of falsely

certifying an oath in violation of Section 53-368.

2. Mr. Biller desires to testify in his own defense in the instant matter.

3. If this Court should rule that the State would be allowed to impeach Mr. Biller with those previous convictions, he would be deterred from testifying in his own defense, thus depriving him of the most effective witness available to present a defense in the instant charges. Mr. Biller is entitled to know, prior to deciding whether to testify in his own defense, whether this Court will allow the State to impeach him with these prior convictions.

4. While Section 52-145 permits the Court to allow impeachment of a witness on a cross-examination by a conviction of a crime if the maximum permissible penalty

for the crime may be imprisonment for more than one year, this Court has the inherent authority to exclude evidence where its prejudicial tendency out-weights its probative value. State v. Nardini, 187 Conn. 513 (1982); State v. Marquez, 160 Conn. 47, 52 (1970).

5. The defendant submits that if the State were allowed to impeach him with prior convictions, the prejudicial effect of that evidence would far outweight its materiality and relevancy on the issue of credibility.

6. Because the prior conviction involved documents relating to a questioned fire loss, there can be no doubt that admission of those convictions is overwhelmingly prejudicial as this case also concerns allegations of impropriety

with respect to claims for fire loss.

7. Although the convictions occurred in the summer of 1979, the incidences which gave rise to those convictions occurred in April and June of 1974, more than eight years prior to the date of the instant trial and seven years prior to the date of the offense alleged in the instant case.

8. While the defendant recognizes the claim that this conviction may have a bearing on the defendant's credibility, the similarity between the facts surrounding the earlier case and the instant case is so marked that the balance must be struck in favor of precluding the State from using said convictions to impeach the defendant's credibility.

9. And for such further reasons as may become apparent upon the hearing of this

motion.

WHEREFORE, the defendant respectfully requests that this Court rule, prior to trial, that the State may not use these prior convictions to impeach Mr. Biller when he elects to testify in his own defense.

THE DEFENDANT

BY _____
William F. Dow, III
JACOBS, GRUDBERG & BELT, P.C.
His Attorneys

O R D E R

The foregoing motion having come on before me and it appearing that the same should be granted, it is hereby ORDERED:

DENIED

BY THE COURT

J. Sullivan /s/
Clerk

No. CR6-193278

STATE OF CONNECTICUT : SUPERIOR COURT

V. : J.D. OF NEW HAVEN
at New Haven, G.A. 6

MEYER BILLER : NOVEMBER 12, 1982

MOTION TO SUPPRESS EVIDENCE

The defendant moves to suppress as evidence in any and all proceedings against him all evidence seized and obtained in the instant matter and any and all evidence, tangible and intangible, directly obtained or indirectly derived from said evidence. The defendant relies on his rights under the Fourth and Fourteenth Amendments to the United States Constitution, Article I, Section 7 of the Constitution of the State of Connecticut, and the relevant portions of the Connecticut General Statutes, in one or more of the following respects:

1. The property was seized without a

warrant;

2. The warrant is insufficient on its face;

3. The property seized is not adequately described in the warrant;

4. There was not probable cause for believing the existence of the grounds upon which the warrant was issued;

5. The warrant was issued without a sufficient independent judicial determination of probable cause;

6. The warrant was illegally executed;

7. The warrant was not executed and returned with reasonable promptness;

8. The warrant which led to the search was illegal;

9. The allegations contained in the affidavit, which was the basis for the search warrant, are not true; and

10. For such further grounds as may

become apparent upon the hearing of this motion.

THE DEFENDANT

BY _____
William F. Dow, III
JACOBS, GRUDBERG & BELT, P.C.
His Attorney

O R D E R

The foregoing motion having come on for a hearing before me and it appearing that the same should be granted, it is hereby ORDERED:

DENIED 11/5/82

BY THE COURT

_____
Clerk

APPELLATE COURT NO. 2073

STATE OF CONNECTICUT : SUPREME COURT

v. : STATE OF CONNECTICUT

MEYER BILLER : FEBRUARY 17, 1986

[Excerpt from]
PETITION FOR CERTIFICATION

To the honorable chief justice and associate judges of the supreme court.

The undersigned respectfully represents:

1. He is a party defendant in the above entitled action.

2. He is aggrieved by the decision of the court in State v. Biller, 5 Conn. App. 616 (1985), upon questions of law arising in the trial of the action, and desires to appeal from the final judgment to the supreme court.

I. STATEMENT OF THE MATTER INVOLVED

A. STATEMENT OF PROCEEDINGS

The defendant was arrested for acting as a public adjuster without a license, General Statutes §38-71, and by substituted information was also charged with interference with a police officer, General Statutes §53a-167a. After the trial, the jury retired, announced a deadlock, received the so-called "Chip Smith" charge, deliberated some more, and returned deadlocked on the charge of acting as a public adjuster without a license, but convicted the defendant of interfering with a police officer. The trial court (Sullivan, J.) then sentenced the

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was prevented from testifying on his own behalf. (R. 28-31, Tr.50, 604). The trial court also took the conviction on appeal

into account in sentencing the defendant to the maximum of one year and imposing a $500.00 fine. (Tr. 733-34.) It has now been determined that the prior conviction was invalid as a matter of constitutional law. The conviction was reversed because it was based on involuntary testimony, in violation of the privilege against self-incrimination. State v. Biller, 190 Conn. 594, 605 (1983). On remand the trial court (Higgins, J.) found that the defendant could not have committed the crime as a matter of law, even under the prosecution's theory of the disputed facts, and dismissed the action. A copy of Judge Higgins' memorandum on the motion to dismiss is also attached. The state did not appeal the dismissal. Therefore, it has now been conclusively determined that the trial court in this case acted on what

turned out to be misinformation of constitutional magnitude. The prior invalid conviction, which did not even constitute a crime as a matter of law and which was based on coercion, prevented the defendant from testifying and was used to enhance his punishment.

II. QUESTIONS PRESENTED

1. Should the defendant's conviction be reversed because it was based on a prior conviction then on appeal which was constitutionally invalid because it was based on coerced testimony and because the defendant's acts did not constitute a crime as a matter of law?

2. Should the defendant's sentence be vacated because it was based on a prior conviction then on appeal which was constitutionally invalid because it was

based on coerced testimony and because the defendant's acts did not constitute a crime as a matter of law?

3. Did the trial court err in refusing to find that the defendant's arrest was without probable cause and the search incident to that arrest illegal?

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defendant's person during this illegal arrest must also be suppressed." Brief for Defendant at 12. Furthermore, in responding to the State's argument that Licari should be overruled, the defendant in his reply brief stressed the fact that evidence was seized pursuant to an illegal arrest which would require suppression and reversal in any event. Reply Brief for Defendant at 3.

The court below did not decide the

question of probable cause because, under its analysis of State v. Privitera, 1 Conn. App. 709 (1984), it was irrelevant. State v. Biller, 5 Conn. App. at 620. Therefore, the opinion below would allow, in effect, evidence seized during an illegal arrest to be used to support an interfering charge, which is what happened here. As such, the court below is wrong. The fruits of a search incident to an illegal arrest must be suppressed under the Fourth and Fourteenth Amendments and under Article 1, §7 of the Connecticut Constitution. E.g., State v. Kimbro, 197 Conn. 219, 223 (1985); State v. Guertin, 190 Conn. 440, 453-4 (1983).

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[Excerpt from Brief of Defendant on Appeal to the Appellate Court of the State of

Connecticut]

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them. Wong Sun v. United States, supra; Beck v. Ohio, supra; United States v. Ventresca, supra. Under all the circumstances, a reasonable prudent police officer would not have concluded that the defendant committed the crime of adjusting without a license on March 12, 1982. The trial court erred in concluding otherwise. An illegal arrest does not confer jurisdiction on Connecticut courts. State v. Licari, 153 Conn. 127, 132-34 (1965); State v. Iasevoli, 183 Conn. 325, 331-32 (1982); State v. Gallagher, 191 Conn. 433, 438-39 (1983); State v. Heinz, 38 Conn. Sup. 570, 574 (1982). The defendant has preserved this jurisdictional issue by a timely motion to dismiss. (R. 24.) Therefore, the motion to dismiss, which should have been granted below, must be

granted by this Court, and the information ordered dismissed. The evidence seized from the defendant's person during this illegal arrest must also be suppressed.